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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES, PETITIONER

v.

BINGHAMTON CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 65-72) is reported in 123 C. Cls. 804.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1952 (R. 72). The Government's petition for a writ of certiorari was filed May 12, 1953, and granted on October 12, 1953 (R. 73, 75). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

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QUESTION PRESENTED

Whether the schedule of minimum wage rates specified in a government construction contract, pursuant to the Davis-Bacon Act, is a representation or warranty to the successful bidder that it will not have to pay higher wages than those in the schedule to attract workers.

STATUTE INVOLVED

The Davis-Bacon Act (Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U.S.C. 276a) provides in pertinent part:

> * * * That the advertised specifications for every contract in excess of $2000, to which the United States or the District of Columbia is a party, for construction * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State * * * in which the work is to be performed * * *; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work

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* * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.

PROVISIONS OF THE CONTRACT INVOLVED

Article 17 of the contract involved (No. W-321-eng-261) reads as follows:

> Article 17. Rate of wages. (In accordance with the act of August 30, 1935, 49 Stat. 1011 (U.S. Code, title 40, sections 276a and 276a-1), this article shall apply if the contract is in excess of $2000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia.)
>
> (a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, * * *.
>
> (b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there

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has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.[1]

Section 1-31 of the specifications furnished bidders and made part of the contract (Article 1, R. 6) provided:

1-31. *Wage and Labor Provisions.—(a)* The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	Wage rate, hourly
Carpenters, journeymen	$1.00
* * * * *	*
Laborers, unskilled	0.50
Laborers, concrete puddlers ...	0.50

Paragraph 1-12 of the Standard Government Form of Invitation for Bids provided in pertinent part as follows:

Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution

[1] Article 17 is set out in the Standard Construction Contract, U. S. Standard Form No. 23-Rev., reproduced in the Appendix to Title 41 U.S.C.A., § 54.13, p. 235.

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> of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work.

STATEMENT

On January 31, 1941, on the request of the Corps of Engineers, the Secretary of Labor furnished a schedule of minimum wages for inclusion in the contract specifications for a flood protection project along the north bank of the Chemung River, within the limits of the City of Elmira, New York.[2] The schedule set the minimum hourly wage for carpenters at $1.00 per hour and for unskilled labor at $.50 per hour. Pursuant to the Davis-Bacon Act (*supra*, pp. 2-3), this schedule was included in the specifications furnished to respondent (a corporation with its principal place of business in Binghamton, New York) prior to the computation of its bid on the flood protection project. In response to invitations for bids issued by the Corps of Engineers on March 29, 1941, respondent submitted a bid, based upon a unit price ap-

[2] The work to be done consisted primarily in the construction of levee embankments and new concrete walls; raising an existing wall; and construction of sewers, culverts, drains, and manholes (R. 9).

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plied to the various operations involved in the performance of the work, in the amount of $232,669.30. The Government accepted respondent's bid on May 14, 1941. The specifications were made part of the written contract, No. W-321-eng-261, dated May 14, 1941, and approved June 3, 1941 (Art. 1, R. 5-8), which required the contractor to pay all mechanics and laborers "wage rates not less than those stated in the specifications" (Art. 17, R. 7). *Supra*, pp. 3-4. On June 5, 1941, respondent received formal notice to proceed with the work (R. 42).

Theretofore, on October 22, 1940, the Elmira business agent of the carpenters' local union had informed the United States Engineer's Office in Binghamton that the wage scale for carpenters would be increased from $1.00 per hour to $1.125 per hour as of January 1, 1941 (R. 43). On October 29, 1940, receipt of the letter was acknowledged (R. 43).

On March 4, 1941, some three weeks prior to the issuance of the invitation for bids on the Chemung River flood protection project of the Corps of Engineers, the Secretary of Labor had furnished another government agency, the Public Buildings Administration of the Federal Works Agency, "a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira" (R. 44). That schedule showed the prevailing hourly rates on that type of project for journeymen carpenters as $1.125 and for unskilled laborers as $.55.

Although not required to employ exclusively

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union labor on the flood protection project, respondent did so, and on June 3, 1941, when it began work on the site it paid $.625 per hour for laborers and $1.125 per hour for carpenters. The union had put the carpenter wage rate in effect on January 1, 1941, and the laborer wage rate on April 1, 1941.

On June 16, 1941, respondent advised the District Engineer (who was also the contracting officer) that the minimum wage rates provided in the contract specifications for the flood protection project were less than the rates currently prevailing in the Elmira locality (R. 44). When relief was withheld by the District Engineer, respondent protested to the Chief of Engineers who denied the appeal and disclaimed authority to question the correctness of any determination made by the Secretary of Labor (R. 44). In response to an application for reconsideration, respondent received a reply from the Chief of Engineers reading in part as follows (R. 45):

> A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1-31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract.

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> No reason has been shown which would warrant modification of the previous decision dated August 5, 1941.

Respondent thereupon brought suit in the Court of Claims on various items,[3] *inter alia* for $15,597.38, the difference in cost between $1.00 and $1.125 (in wages for carpenters) and between $.50 and $.625 (in wages for unskilled laborers and concrete puddlers). The Court of Claims specifically found that "If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour effective as of April 1, 1941" (R. 45). Nevertheless, it allowed respondent a recovery of $7,363.22, on the ground that when the Corps of Engineers represented in the invitation for bids and in the contract specifications that the Secretary of Labor had determined the prevailing wage rates to be $.50 and $1.00, this was a positive misrepresentation of the Secretary's latest determination, upon which respondent was entitled to rely. It was "a representation of the wages it would have to pay when the work was to be done" (R. 68).[4]

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[3] The Court of Claims denied respondent recovery in respect of the claims other than the one here involved. That part of the court's judgment is the subject of respondent's petition for a writ of certiorari in No. 78, this Term.

[4] The recovery did not include the claim for the difference between $.55 and $.625, which was the increase obtained by the union for unskilled labor on April 1, 1941, because it was not shown that the District Engineer knew or should have known

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SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Secretary of Labor's determination, required by the Davis-Bacon Act, of minimum wage rates to be paid for work upon a government construction contract, constitutes a representation to a successful bidder that labor could be procured in the community at the rates determined by the Secretary.

2. In holding that the incorporation of such a determination in a contract, which incorporation was required by the Davis-Bacon Act, was a representation by the United States that the successful bidder could obtain labor at the rates set forth in the contract.

3. In holding that the failure of the specification of minimum wage rates to reflect increased union wage rates constituted a misrepresentation to the successful bidder.

4. In holding that the determination of minimum wage rates and incorporation in the contract of the specification reciting those rates was a representation upon which the successful bidder was entitled to rely.

5. In holding that the Secretary of Labor made a "superseding" wage determination in this case.

6. In holding that the successful bidder was not estopped to claim misrepresentation where it had willfully neglected to inform itself as to the rate at which local labor could be procured.

7. In entering judgment for respondent.

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of the increase nor that the Secretary of Labor had made a wage determination recognizing this rate prior to the acceptance of respondent's bid (R. 68-69).

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SUMMARY OF ARGUMENT

I

The decision of the Court of Claims is based upon a misconception of the Davis-Bacon Act and the function of Article 17 of the contract, and specification 1-31 incorporated therein (*supra*, pp. 3-4, 5). The Act and the contract provisions are for the benefit of labor and confer no right, but merely place an obligation, upon the contractor. That obligation is simply to pay "not less" than the stipulated minimum wages.

1. The Davis-Bacon Act had for its purpose the placing of a floor under wages to be paid local mechanics and laborers for work performed on government contracts. It required the Secretary of Labor to determine the prevailing wage of each class of labor in each locality where a government contract was to be let and to supply those rates to the procurement agency. In turn, that agency, in its invitation for bids, sets forth the minimum wage rates which the successful contractor would be required to pay. After the acceptance of the bid, the Act provides that the contract require the contractor to pay those *minimum* rates, with certain penalties specified if the contractor fails to do so. The contract and the specification speak of "minimum wage rates" and require the contractor to pay "not less" than those rates. Neither the contract nor the specification undertakes in terms to represent that the contractor would be able to obtain labor at the minimum wage rates set forth in the specification or that wage increases may not occur

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during the course of the performance of the contract. The terms of the contractual provisions are limited to the minimum wages the contractor will have to pay in order to comply with the Davis-Bacon Act.

For that reason, no misrepresentation of facts or conditions can be found in these contractual provisions. The facts stated in the contract and specifications are true. They set forth the applicable minimum wage rates actually determined by the Secretary of Labor. They do not even describe these rates as prevailing rates. Respondent was not advised that it would be able to procure labor for the rates set forth therein or that there would not be increases in wage levels between the time the invitations to bid were drawn up and issued, the bid accepted, the contract signed, or the project completed. On its face, the sole undertaking of the United States was that it would not insist that the contractor pay any more than the minimum wage as specified, irrespective of what increases there might be in the prevailing wage rates at the locale.

2. Nor is there any reason to read into the contract and specification an implied warranty or representation that respondent would be able to procure labor at the specified minimum wages. The Government's purpose is to confer a benefit on the workmen by fixing minima below which the contractor may not go, irrespective of local wage fluctuations. The Government has no concern to protect the contractor against having to pay higher

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wages but only to make certain he does not pay lower wages than those specified. While the statute required the Secretary of Labor to fix the minimum wages on the basis of those prevailing in the locality, the Secretary of Labor does not deal with prospective bidders, makes no representation to them, and could have no interest in the course of the performance of her statutory functions to make representations to such bidders as to what wages the workers might demand. The procurement agency, in turn, had no option but to incorporate the Secretary's determination in the specification and in the contract. The procuring agency merely performs a ministerial function on behalf of the Secretary and the policy of the Davis-Bacon Act to call attention to a "floor" without fixing a "ceiling." To read into the contract, as did the court below, a representation to the contractor that he could obtain the labor for the specified minimum prices has no basis whatsoever, either in the terms or purpose of the Davis-Bacon Act, the language or purpose of the contract and specifications, or in the procedures for establishing minimum wages to be inserted in the contract.

II

Even on the Court of Claims' view that an undisclosed "superseding" wage determination turns the contractual determination into a misrepresentation of the "prevailing wages", the decision below is erroneous. The court seeks to find misrepresentation in the fact that, prior to the issuance of

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the invitation to bid in this case, the Secretary of Labor had made a different and higher determination of the prevailing wages in the local area for carpenters and unskilled labor in respect of a different federal project, which was to be undertaken by another government agency. The Secretary, however, never made a different determination for this particular contract. Accordingly, there was no second determination of minimum wage rates for this project which was withheld from the respondent. As noted before, there was no privity between the Secretary and respondent. She had made no representation to it and was under no obligation to readvise it of any changes which she had found in the prevailing local rate for a different project. Moreover, her determination, which was not subject to judicial review (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113), could well have been based upon the difference in the degree of skill required of carpenters who construct wooden frames into which concrete is to be poured and carpenters who construct dwellings. It was in respect of the latter that the Secretary made the higher minimum wage determinations.

Nor does the fact that these different rates were known to the procurement agency constitute any basis for a finding of misrepresentation. The contractor was not, and could not, be required to pay the second rates found but only the original contractual rates. The duty of determining the price at which labor could be recruited was under the terms of the contract placed upon the prospective

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bidders and not upon the procurement agency. There is nothing to indicate that the procurement agency knew that respondent was not as fully advised of the prevailing rates in the locality as was the agency or the Secretary of Labor.

III

The contractor is estopped to claim misrepresentation. Under the invitation to bid, it was specifically required to ascertain the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, and other matters. The invitation emphasized that the failure to obtain all available information would not relieve the successful bidder of responsibility for estimating the difficulties or costs of successfully performing the complete work. In bidding upon the contract, respondent implicitly accepted this condition. It must be assumed either to have conducted the necessary local investigation or waived any right to claim excess costs because of conditions which it could have discovered but which, through lack of diligence, it failed to discover. In fact the Court of Claims found that had the president of respondent investigated local conditions he could have readily ascertained that respondent would have been required to have paid higher wages for carpenters and unskilled labor than those set forth in the specification. This he neglected to do, relying upon his belief that the Secretary of Labor always fixed the rates at too high a figure and that there could not possibly be any

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difficulty in recruiting labor at the minima which the contract fixed.

Like other conditions of the contract, the United States has contracted and paid for this condition. Respondent cannot now be heard to claim that its increased labor costs resulted from governmental misrepresentation when, in truth and in fact, it resulted from it's own failure to perform an obligation which the contract placed upon it and which it, at least inferentially, agreed to perform.

ARGUMENT

I

The Schedule of Minimum Wage Rates Specified in a Government Construction Contract, Pursuant to the Davis-Bacon Act, Is Not a Representation to the Successful Bidder of the Wages it Will Have To Pay

The Court of Claims has held that the provisions of a government construction contract, which require that a contractor pay laborers on the contract project not less than the minimum wages set forth in a specification incorporated in the contract, is a representation by the United States that the contractor will be able to obtain laborers at these minimum rates. This interpretation of the standard building contract provisions for minimum wages, required by the Davis-Bacon Act, misconceives its history, terms and scope, and imposes a wholly unjustified burden upon the Government. The determination by the Secretary of Labor of the minimum wage which the contractor must pay, made to satisfy the policy of the Davis-Bacon Act

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and protect workers against substandard wages, does not reasonably imply or even intimate that the contractor will not have to pay more.

1. It is indisputable that the motivation for the Davis-Bacon Act was to benefit workers in the construction field. It required the inclusion in government building contracts of *minimum* wage schedules which the contractor would be required to pay and this requirement was for the limited legislative purpose of putting a floor under wages and thereby protecting workers against substandard earnings. *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788 (C.A. 2), certiorari denied, 305 U.S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585 (C.A. 5); *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 61; 74 Cong. Rec. 6505, *et seq.*; 79 Cong. Rec. 12073; House Rep. 1756, 74th Cong., 1st Sess., p. 1; Sen. Rep. 1155, 74th Cong., 1st Sess., p. 1; Sen. Rep. 1445, 71st Cong., 3d Sess.; *cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.[5]

With that end in view, the Davis-Bacon Act specifically requires the inclusion in the advertised specifications, and in the contract, of the "*minimum*" wage rates determined by the Secretary of Labor, and provides that the contractor stipulate to pay "*not less*" than the wage rates stated in the advertised specifications. *Supra*, pp. 2-3. No reason has been suggested here or in the court below

[5] In the *Endicott Johnson* case, it was said that the purpose of the related Walsh-Healey Public Contracts Act "is to use the leverage of the Government's immense purchasing power to raise labor standards."

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why the specifications should have gone beyond the statutory requirement, since a representation of the actual wages the employees would demand and receive was not necessary for the particular work, was not contemplated by the Act, and would promote no public policy declared by the Congress.

The terms of the particular contract bear out the reading that protection of the builder's employees from substandard wages is the sole purpose of its minimum wage stipulations. Article 17(a) (*supra*, p. 3) requires respondent to pay wages "computed at wage rates *not less* than those stated in the specifications" (emphasis added). Specification 1-31 (*supra*, p. 4) declares that the Secretary of Labor has determined that certain *minimum* wage rates are to be "applicable in the locality" of the work, enumerates twenty-six classes of employees and the *minimum* wage rates applicable to each class, and then provides that in accordance with Article 17 of the contract "employees at the site shall be paid *not less* than these wages" (emphasis added).[6] On its face, Specification 1-31 was plainly not intended as a representation and was not phrased as one, but in terms imposes an ob-

[6] The specification states that "In accordance with Article 17 of the contract, employees at the site shall be paid *not less* than these wages as listed below" (emphasis added). In contrast, in *Irwin & Leighton* v. *United States*, 115 C. Cls. 18, 23, 33, where the Court of Claims held there was no misrepresentation by the Government, in *Sunswick Corporation* v. *United States*, 109 C. Cls. 772, 776, 803, and in *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 39, the specifications read that "The wages *to be paid* laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing * * * *are as follows* * * *" (emphasis added).

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ligation on the contractor. Article 17(b) (*supra*, pp. 3-4) gives the Government the right to terminate the work if the contractor pays *less* than the required wages. The contract does not refer either in Article 17, in the specifications, or elsewhere, to "prevailing wages", but speaks only of "minimum wage rates" and "wage rates not less than those stated in the specifications." The Act itself, as we have noted, envisages the possibility that the builder may have to pay higher wages, when it requires payment at rates *not less* than those stated in the advertised specifications.

2. We would have thought that consideration of these provisions of the Act and the contract should summarily end the matter, but respondent's contention that "the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality * * *" (R. 2, 37) was nevertheless accepted by the court below, which took the view that the Secretary's determination, "so far as plaintiff's rights are concerned," "amounted to a determination of the prevailing wage," and "a positive representation * * * from the consequences of which the defendant cannot be relieved" (R. 68).

But it is clear, as we have already suggested, that, as a matter of plain language, there cannot be said to have been any misrepresentation. In the context of Article 17, which specifically refers to the Davis-Bacon Act, Specification 1-31 (*supra*, p. 4) stated only the objective and true fact that the Secretary of Labor had determined that the contractor would have to pay carpenters $1.00 an hour

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and unskilled laborers $.50 an hour in order to comply with the minimum wage statute. The Secretary of Labor had made a determination of the applicable minimum wage rates for the purposes of the Davis-Bacon Act, and the rates set forth in the specifications were those determined by the Secretary for that purpose. As we have noted, the contract and specifications call the specified rates the "minimum" and simply require the contractor to pay "not less" than those wages.[7] The term "prevailing wages" is not used in the contract or specification, and so there is no statement or representation that the minimum rates were in fact the prevailing rates. Had respondent been able to procure the required labor at the rates of pay set forth in the contract, it would have complied with the contract requirements irrespective of what rates the local union demanded or what rates were actually "prevailing" in that area. Under the terms of the contract, as long as the Government abides by the determination, does not insist on payment of an intervening increase, does not withhold moneys from the contractor nor terminate the right to proceed because of failure to pay the specified wages (40 U.S.C. 276a, 276a-1), the contractor has nothing to challenge, and there is nothing on which he is entitled to rely. In a word, nowhere

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[7] A specification of minimum wages required by statute to be included in a contract as a measure of the builder's obligation is scarcely the place one would look for a warranty for the benefit of the builder. The court below nevertheless erroneously converted a measure of the builder's obligation into a contractual undertaking on the part of the Government for the builder's benefit.

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within the four corners of the contract is there an express representation or warranty running to the contractor that the minimum wage is the maximum or the only wage that will have to be paid, or even a textual hint of such a representation or warranty. [8]

3. Nor can a warranty that higher wages would not have to be paid be rationally implied from either the Act or the contract. All the relevant cases and legislative materials, as well as the terms of the Davis-Bacon Act and of the contractual stipulations involved here (*supra*, pp. 2-4, 16-20), demonstrate that the Government's concern was the protection and benefit of the employees; the Government was not concerned to protect the contractor against paying higher wages nor to guarantee that sufficient employees could be hired at the established minimum. As in all normal construction agreements, the contractors, "by making their contracts, agreed to pay whatever wages they had to pay to get the labor necessary to do the job." *Winn-Senter Constr. Co.* v. *United States*, 110 C. Cls. 34, 61.

The actual mechanism for determining the minimum wages supports this conclusion that there

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[8] As this Court said in *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6, 11-12, the cases "all declare the principle that the Government will be liable in the same circumstances that private individuals would be liable, but necessarily, neither is liable if neither makes representations."

In the pertinent findings (Fdgs. 5-17, R. 42-46), the Court of Claims has significantly failed to find that the respondent relied on the wage schedule as a representation of the wages it would have to pay. The opinion, however, states that respondent computed its bid in reliance on the schedule (R. 67). *Cf. United States* v. *Esnault-Pelterie*, 299 U.S. 201, 205; *United States* v. *Causby*, 328 U.S. 256, 267-268, and see *infra*, p. 26.

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was no purpose to protect or guarantee the contractor, and therefore no reason to imply a representation or guarantee. The Secretary of Labor, who made the determination, was not in privity with respondent and could have no interest in inducing it to rely on any representation as to the wages that workers might demand. The contracting officer, who in turn was without authority to fix minimum wage rates, had no option under the Davis-Bacon Act but to incorporate the Secretary's determination in the specifications and contract. Thus, the wage-determining agency plainly had no aim to guarantee the respondent, and the procurement agency merely acted, under the statute, as a ministerial conduit for passing on the Secretary's minimum-wage determinations and incorporating them into the contract and specifications.

It is true that the Davis-Bacon Act does require the Secretary to base the contractual minima on the wages "prevailing" in the locality (*supra*, p. 2), and it is on this statutory requirement that the Court of Claims mainly pins its conclusion that, since the prevailing rates were found to be actually higher, the wage schedule in this case was misrepresented. But a statement or declaration by one party, made for a limited purpose, is not a misrepresentation in other contexts if the second party is not entitled to rely on it for the other purposes.[9] As we have shown, it is plain, both from the terms and aims of the Davis-Bacon Act and

[9] We point out above (*supra*, pp. 17-18, 18-19) that neither the contract nor the specifications refer to "prevailing wages," but speak of "minimum wage rates" and require the payment of wages "not less" than those determined by the Secretary.

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from the wording and purpose of the contract provisions, that the Secretary made her determination of minimum wages solely to protect the workers and to fulfill the demands of the minimum wage law, and not for the benefit of the contractor by giving it information as to the wages at which it could attract workers. Indeed, the Secretary had no authority to determine "prevailing" or minimum wages for any end not related to her protective functions under the Davis-Bacon Act. Accordingly, the determination of the minimum wage rates, being solely for the benefit of the labor to be employed, was not one upon which the contractor was entitled to rely and conferred no right of action upon the contractor, irrespective of any error therein. *Cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127.

Moreover, as a practical matter, bidders know in advance that the Secretary's determination can be, at best, only an approximation.[10] They know, for example, that the interval between a request for a wage determination, on the one hand, and the issuance of the Secretary's determination on the other, is usually two or three months. Obviously, the minimum wages specified in the contract were not determined the very day the invitation to bid was issued. In these circumstances, both

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[10] The procedure and sources for the predetermination of rates of wages, described in Title 29, C.F.R., Subtitle A, Part 1, Secs. 1.1-1.20, show the inevitability of differences of opinion. The Secretary is under constant pressure from contractors not to fix prevailing wages too high. *Cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

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parties can foresee that changes may occur [11] and it is reasonable to assume that the Government did not insure against an increase in wage levels between the time the determination is made and the time (i) invitations to bid are drawn up and are issued, (ii) the bids are filed, (iii) the successful bidder is notified that he has been awarded the contract, and (iv) work on the project is begun. A statement of the minimum wage the contractor must pay is certainly not a representation to it that the facts justified no other determination nor that the minimum wages in the specifications had been pinpointed in advance at precisely the level that would obtain at the time the invitations for bids are issued and the work on the project is begun.

In sum, there is nothing in the terms of the Davis-Bacon Act or the contract which sets forth any specific warranty or representation as to the

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[11] See Title 29, C.F.R., Subtitle A, Part 5, Sec. 5.4. Section 5.4, 16 F.R. 4430, effective July 1, 1951, provides that if a contract for which a wage determination is sought is not awarded within 90 days of the original determination, it is obsolete and a new determination should be requested.

Under the 1935 amendment, the Secretary writes the prevailing rate of wages into the contract in advance rather than after a dispute has arisen, as under the 1931 Act. *Gillioz* v. *Webb*, 99 F. 2d 585, 587 (C.A. 5); *Gilbert Engineering Co.* v. *United States*, 82 C. Cls. 616, 623; 79 Cong. Rec. 12073.

An amendment to S. 3487, 72d Cong., 1st Sess., in the form originally approved by the Senate, would have had the predetermined wage rates increase or decrease during the performance with a corresponding adjustment in the contract price. H. Rep. 1441, 72d Cong., 1st Sess.; Sen. Rep. 509, 72d Cong., 1st Sess.; 75 Cong. Rec. 8365, 12381-12387. It was defeated in the House because its opponents believed it would introduce cost-plus elements and shift responsibility from the contractor to the Government. 75 Cong. Rec. 12385-12387.

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wages that will have to be paid by the contractor. On the contrary, these terms warn that the specified wage rates are merely minima. And there is nothing in the policy or purpose of the Act, or the procedures for determining minimum wage rates, from which such a warranty or representation can be fairly implied. In finding one, the court below has simply enlarged the Government's obligations beyond those assumed expressly or by fair implication, in the face of the constant admonitions of this Court. *Smoot's Case,* 15 Wall. 36, 45; *cf. Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76-77.

II

No Superseding Wage Determination Was Ever Made

The Government's position is that, for the reasons stated in Point I, no representations as to wage rates were ever made to respondent and that, even if an undisclosed inconsistent determination had been made later, respondent was not entitled at any time to assume that it would not have to pay higher wages than those set forth in Specification 1-31. But the Court of Claims finds special reason to hold the United States in what it misconceives to be a later superseding wage determination which was not disclosed to respondent (R. 68).[12] This error is an additional reason why the judgment below cannot stand.

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[12] The assumption of a superseding determination is vital to the holding below, as is made plain by (a) the statement that "Plaintiff was entitled to rely on it as the Secretary's *latest* determination" (R. 68), (b) the holding that respondent was entitled to recover "the difference between the wages specified

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As shown in the Statement, *supra*, pp. 5-6, the later determination of March 4, 1941 was for entirely different work, a housing project, to be constructed for another agency, the Public Buildings Administration. The Secretary made no new determination for the Engineer's flood protection project, on which respondent was the contractor. There may be different determinations by the Secretary of Labor for different projects in the same city. The Davis-Bacon Act requires a (pre) determination [13] of wages prevailing on projects of a character similar to the contract work. What is a project of a similar character is for the Secretary of Labor to determine. *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 61; *cf. United States* v. *W. S. Barstow & Co.*, 79 F. 2d 496 (C.A. 4).

The contractor asserts that the housing project was similar (R. 38), but the Secretary of Labor never determined that to be the fact, [14] and the contractor's assertion is not self-evident. All

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in the Invitation for Bids * * * and those which the Secretary of Labor determined on March 4, 1941 to be the prevailing wages" (R. 68), and (c) the emphasis in dealing with the additional (unaccepted) claim for misrepresentation that "the evidence does not reveal that the Secretary of Labor made a wage determination recognizing this rate prior to the acceptance of plaintiff's bid" (R. 68). See fn. 17, *infra*, p. 29.

[13] As noted above (pp. 22-23), the statute in requiring the minimum wages to be stated in the advertised specifications plainly requires the determination to be made prior to the issuance of invitations to bid and the acceptance of bids.

[14] The Secretary's wage determination is not subject to judicial review at the contractor's instance. *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.

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the Secretary had actually done was to make a determination of wages on a separate *housing* project. The findings below neither justify nor compel the inference that the January 29, 1941, determination for the flood protection project, so far as it went, was superseded in fact, or that the Secretary had so determined. *Cf. Irwin & Leighton* v. *United States,* 115 C. Cls. 18, 41-42. The opinion, which states that at the time of the invitation for bids on March 29, 1941, "the Secretary of Labor had since issued a *new determination* of the prevailing wage rates for Elmira" (R. 66, emphasis added) outstrips the neutral finding that "On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York" (R. 44) (if, as seems the clear purport, by "new determination" or "redetermination" (R. 67) the opinion means a superseding determination for a similar project). It is settled, however, that the opinion cannot supply critical defects in the findings. *Cf. United States* v. *Esnault-Pelterie,* 299 U.S. 201, 205; *United States* v. *Causby,* 328 U.S. 256, 267-268. And there is no *a priori* ground for assuming an identity between the projects. Building houses may well call for higher attainments and skills, and be more exacting, than erecting and placing the wooden forms or supports to hold the concrete poured for the walls and embankments of flood protection projects.

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There is sound reason for insisting that no subsequent determination be held to be "superseding" unless it indisputably appears that the later determination is actually for the same project. Since every determination under the Davis-Bacon Act is of necessity made for a specific project, it would be intolerable to require a contracting officer to inform himself of every other determination, made for other agencies and other projects, and to modify the specifications on his own judgment as to whether another determination might be applicable or refer the question back to the Secretary of Labor for further action. Such a procedure would make it exceedingly difficult for specifications to be completed or contracts to be awarded in areas in which there might be numerous government projects under way at any given time, particularly in periods of rapid upward wage movements.[15] This is particularly true where as here

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[15] It should be noted that in denying the claim for the additional increase obtained by the union for unskilled laborers on April 1, 1941, two days after the invitation for bids had issued, the Court of Claims did not dismiss it out of hand but only because it was not shown (1) that the District Engineer knew or should have known of the increase at the time the contract was awarded, and (2) that the Secretary made a wage determination recognizing the increase prior to the acceptance of the bid (R. 68-69). Thus, even if the specifications met the court's rigid standards when the invitation issued, the court has implicitly held that they might become misrepresentations overnight. The court below has held that respondent was entitled to rely on the minimum wage schedule "as the Secretary's latest determination—as a representation of the wages it would have to pay when the work was to be done" (R. 68).

In any event, assuming respondent relied on the minimum wages in the specification *in computing its bid* (see *supra*, p. 20, fn. 8), this reliance could not have been carried forward to the acceptance of the bid on May 14, 1941, and the commence-

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the specification deals with large numbers of different classifications of labor with varying minimum rates. The clearest showing must be required to substantiate a claim of a "superseding" determination for the same project. [16]

Since the record shows no "superseding" determination for the particular project involved here, the whole misrepresentation hypothesis—apparently based by the Court of Claims on the subsequent determination in March 1941 (see fn. 12, *supra*, pp. 24-25)—falls of its own weight. The contracting officer's failure to ascertain, before inviting bids, whether or not the Secretary of Labor had made a new determination of "prevailing wage rates" after the determination of January 29, 1941, loses all significance if no redetermination had in fact ever been made for this project. The January 29, 1941 determination would still be the latest de-

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ment of the work, as to increases after the March 29, 1941, invitations to bid. The project was not completed until December 1942 (R. 67). See *supra*, pp. 22-23.

[16] The discussion in the text shows why this case cannot be forced into the mold of *Albert & Harrison, Inc.* v. *United States*, 107 C. Cls. 292, certiorari denied, 331 U.S. 810, relied on below (R. 68). For the reasons stated in Point I, we believe that the *Albert & Harrison* decision was erroneous, but it is significant, in any event, that the alleged misrepresentation there involved was as to the wage rate the Secretary of Labor had fixed on April 4, 1941, *a week before the invitation to bid was issued*, for the very same general project. The bricklayers demanded the prevailing rate as determined in April 1941 by the Secretary of Labor for the same Raritan Arsenal, instead of rates determined October 26, 1940 (which had been incorporated in the contract); the contracting officer, although actually aware of the higher rate for the Arsenal, and better informed than the contractor, withheld the information from the contractor. See *A. J. Paretta Co.* v. *United States*, 109 C. Cls. 324, 349, certiorari denied, 333 U.S. 832.

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termination, and the only one applicable to the flood protection project. [17]

III

Respondent Is Estopped By Its Contract from Claiming Reliance on a Misrepresentation

Respondent secured acceptance of its bid on the strength of the assurances it gave the Government that, regardless of whether it inspected labor conditions and the availability of labor, it agreed to be bound by what an inspection would reveal and assumed the risk of an upturn in wages. [18] This suit repudiates these assurances by the contractor, [19] and the decision below denies the Govern-

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[17] We believe that the opinion below rests squarely on the supposed redetermination of March 4, 1941, to establish a misrepresentation. See fn. 12, *supra*, pp. 24-25. But the opinion is not absolutely clear and the court may have redetermined the prevailing wages for itself. If the court did reject the Secretary's wage determination as incorrect, it in effect subjected the administrative finding to judicial review, at the contractor's instance, contrary to the settled rule. *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. There is not the slightest warrant in the Davis-Bacon Act or in the contract for a redetermination of wages by the court.

[18] Paragraph 1-12 of the Invitation for Bids (*supra*, pp. 4-5) calls upon bidders to ascertain for themselves "the difficulties attending the execution of the proposed contract, including local conditions, availability of labor * * *." It emphasizes that failure to obtain "all available information concerning" local "conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work." Of course, "the availability of labor," of which the bidders were to make their own estimates, is directly related to the wage level.

[19] The court below states that "Prior to the submission of its bid, [respondent] did not attempt to make an independent investigation of the prevailing wage scale * * * but it computed its bid in reliance upon the schedule of minimum wage

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ment the benefit of its bargain by shifting the risk of higher wages from the builder who agreed to bear it to the United States, which specified that the builder assume it.

To permit a contractor to capitalize at the expense of the United States on its own neglect of its duties conflicts with the consistent procurement policy of the Government. That policy has endeavored to prevent reliance by a contractor on assumptions as to prevailing conditions, rather than its taking direct responsibility, making its own diligent investigations and appraisals, and exercising its independent business judgment. The policy is reflected in disclaimer provisions and in provisions which require contractor self-reliance and charge the contractor with the knowledge it would have obtained by investigating on its own account.[20] The "repellent effect" of these provisions on a claim of misrepresentation has been noted by this Court. *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6, 10. Given proper weight, they impose a duty on the contractor to investigate,

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rates contained in the specifications furnished" (R. 67). This clearly states respondent's failure to investigate and predicates respondent's reliance "upon the schedule of *minimum* wage rates contained in the specifications furnished."

Respondent admits the truth of this statement;—"* * * it is true,—and the Court has so found,—that Respondent made no independent investigation of prevailing wage rates, prior to bidding for the contract * * *" (Resp. Br. in Opp., p. 14).

[20] See *Maguire & Co.* v. *United States*, 273 U.S. 67; *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6; *United States* v. *Silverton*, 200 F. 2d 824, 827 (C.A. 1).

These provisions serve a useful purpose and are not against public policy even in private contracts. *Abrams, Inc.* v. *Wolkov*, 371 Pa. 44.

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a violation of which precludes reasonable reliance on alleged representations. The contractor may not profit by its own wrong to put the onus on the Government (*cf. Goess* v. *Ehret,* 85 F. 2d 109 (C.A. 2)), and thereby defeat the contractual intention that it depend on its own exertions instead of retaining an anchor to windward in the form of its own subjective and undisclosed understanding of the Government's statements.

Information as to wage rates was readily available to respondent, a local contractor,[21] and the Court of Claims expressly found that "If plaintiff's president had investigated wage rates, he could have ascertained" the true prevailing rates and the wages upon which the union would insist (R. 45).[22] Failure to investigate is not palliated by the assertion (Resp. Br. in Opp., p. 14) that the president's experience in bidding for Government contracts was that "invariably the wage rates incorporated in said contracts were equal to and sometimes higher, but never lower, than those that actually prevailed in the contract areas." This statement merely emphasizes that, rather than investigate as required, respondent chose to rely on its president's guess. This was a calculated risk on the part of respondent, and it should not be now heard to say that it was misled by the Government rather than by its own agent.

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[21] Binghamton is less than sixty miles from Elmira. It was in Binghamton that the United States Engineers Office was located (*supra,* p. 6).

[22] The contract did not expressly or impliedly require the contractor to supply union labor. See *supra,* pp. 3-4, 6-7.

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In these circumstances, the decision below is harmful to the Government's procurement policy in two separate ways. As noted above, it reads out of the contract the contractor's specific assurances that it agrees to be bound by what an inspection would disclose. *Cf. Wells Bros. Co.* v. *United States,* 254 U.S. 83, 87. The contractor is relieved of the risk of ascertaining wages which a contractual stipulation imposes on it, and which it probably would have to bear even in the absence of a disclaimer provision. [23]

The decision below also is damaging to the Government's procurement policy in another aspect. All bidders are intended to be on a parity, without advantages to bidders who neglect to investigate. By an increase in the contract price after completion of the work, the Court of Claims, on the basis of a judicial redetermination of prevailing wages, confers an unfair preference on contractors who neglect to do their own investigating—as the contract requires—over diligent bidders who do investigate and who anticipate the possibility of higher wage levels in making their bids. This puts a premium on a failure to investigate, both in ascertaining the successful bidder and in computing the total contract price. Thus, should the Government be compelled to reimburse respondent for its own failure and in disregard of its contractual undertakings, it may well be that the cost of perform-

[23] *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379; *Andrus* v. *St. Louis Smelting & Refining Co.,* 130 U.S. 643, 647; *Farnsworth* v. *Duffner,* 142 U.S. 43; *Clark* v. *Reeder,* 158 U.S. 505, 524.

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ance under some other bid, which had been carefully prepared, would have been the low one and would have been accepted. The very purpose of the disclaimer provision was to make sure that the Government should not be required to suffer damage of this kind in order to relieve a negligent bidder.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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